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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 924

LEVISA STONE CORPORATION and JOHNSON BROTHERS LIMESTONE COMPANY, *Petitioners*

v.

ELKHORN STONE COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

Petitioners—Levisa Stone Corporation and Johnson Brothers Limestone Company—pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Judicial Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted as Appendix A hereto, pp. 1a-4a. The District Court for the Eastern District of Kentucky did not file an opinion; its final Order is reprinted as Appendix B hereto, pp. 4a-5a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1969. A timely Petition for Rehearing was denied on August 29, 1969. (Appendix C, p. 6a, *infra.*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1354(1) (1964). The basis of jurisdiction in the District Court was 28 U.S.C. § 1331 (1964).

QUESTIONS PRESENTED

1. Whether an injured competitor, who concededly has standing under the principles of *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968) to challenge the Government's illegal acts contrary to controlling statutory provisions, can sue not only the erring Government officials but also the private party which received illegal financial assistance from the Government, in order to ensure effective relief against the "unfair competition" proscribed by the statute.

2. Whether, contrary to the standards of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), the decision below erroneously restricted the liberalized provisions of new Rule 4 of the Federal Rules of Appellate Procedure by not deferring to the discretion of the district court which granted a thirty-day extension to plaintiffs to file a notice of appeal.

STATUTES AND RULES INVOLVED

Section 702 of the Public Works and Economic Development Act of 1965 (herein "the EDA Act"), 42 U.S.C. § 3212, provides:

"Prevention of unfair competition.

"No financial assistance under this chapter shall be extended to any project when the result would

be to increase the production of goods, materials, or commodities, or the availability of services or facilities, when there is not sufficient demand for such goods, materials, commodities, services, or facilities, to employ the efficient capacity of existing competitive commercial or industrial enterprises."

Rule 4, Federal Rules of Appellate Procedure, provides in relevant part:

"Rule 4.

"APPEAL AS OF RIGHT—WHEN TAKEN

"(a) Appeals in Civil Cases. In a civil case . . . in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or any officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. . . .

* * *

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

STATEMENT OF THE CASE

(i) Introduction

Petitioners are Levisa Stone Corporation (herein "Levisa") and Johnson Brothers Limestone Company (herein "Johnson Brothers"). They are producers of crushed limestone in Southeastern Kentucky. (J.A. 6-7).[1] Respondent Elkhorn Stone Company (herein "Elkhorn") is a proposed new competitor in the limestone crushing business in Southeastern Kentucky. Its limestone quarry and crushing machinery will be located in an area immediately adjacent to Petitioners' plants. (J.A. 7, 9). Elkhorn's entry into the limestone crushing business has been financed essentially with Federal loans and other financial assistance made available by the Economic Development Administration (herein "EDA"). Petitioners charged that this financial assistance violated the controlling "unfair competition" standards of Section 702 of the EDA Act, which Section was placed in the Act to protect competitors in the very economic circumstances presented here.

Petitioners' suit against Elkhorn was filed concurrently in the District Court with a companion action against the Government officials of EDA who granted the financial assistance. (J.A. 18-29) *Levisa Stone Corporation, et al.* v. *Trowbridge, et al.*, Civil Action 1147 (E.D. Ky.). Two separate complaints had to be filed because of the technical requirements of the federal venue provisions. See 28 U.S.C. § 1391(e). After filing, the two complaints were considered de

[1] The Joint Appendix, filed in the Court of Appeals, is included in the record here. It is referred to herein as "J.A." It is in two volumes. Volume I contains the pleadings and other formal papers. Volume II contains certain exhibits. The page numbers in Volume II are preceded by the letter "E".

facto as one, and Respondent Elkhorn moved to consolidate them formally. (J.A. 30).

Defendants in both cases filed motions to dismiss. After oral argument, the District Court held the Petitioners had standing under the principles of *Hardin* v. *Kentucky Utilities* to sue the Government defendants for a violation of Section 702 of the Act. However, the District Court held that Petitioners could not sue the private defendants to prevent them from engaging in the "unfair competition" which Section 702 was designed to prevent. The Court of Appeals dismissed the appeal on a technical procedural point.

(ii) Petitioners have excess and unused capacity to produce crushed limestone, which bars EDA's grant of financial assistance to a new competitor under the standards of Section 702.

Section 702 prohibits EDA from granting financial assistance under the EDA Act to subsidize a new entrant into a particular market when the existing competitors in that market have unused, excess capacity to supply the product in question. As we develop, *infra,* Section 702 was included in the Act for the protection of existing competitors.

There can be no doubt that Petitioners' complaint, as well as their supporting exhibits, demonstrated that they were operating at a level far less than capacity. These assertions, of course, must be assumed to be true, inasmuch as this matter was disposed of on Respondent's motion to dismiss the complaint.

Both Levisa, in business since 1946, and Johnson Brothers, in business since 1952, are major competitors in the crushed limestone market in Southeastern Ken-

tucky. Both have made substantial capital investments, privately financed, in new limestone crushing equipment and facilities to meet any anticipated increases in demand for limestone. Since 1959, Levisa has invested $1.78 million in new limestone crushing facilities and has substantially increased its productive capacity. (J.A. 12). In November, 1966, Johnson Brothers commenced an expansion program, all privately financed, at a cost of $1.1 million which will increase its productive capacity by 400%. (J.A. 13).

Although both Petitioners have substantially increased their productive capacities in recent years, the total demand for crushed limestone in Southeastern Kentucky for all uses is far less than the effective capacity of existing competitors. Levisa estimated that in 1966 and 1967, prior to the challenged grant of financial assistance to Elkhorn, it operated its equipment at only about 22% of rated capacity. (J.A. 40-41). Johnson Brothers estimated that it operated its present equipment at 11% of capacity in 1966 and 13% of capacity in 1967. (J.A. 38). Moreover, because of the lack of sufficient demand, at the time that the complaints were filed, both Petitioners had substantial unused supplies of crushed limestone on hand, waiting for sale.[2]

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[2] Levisa's inventory of crushed limestone was equal to its total sales to the Kentucky State Highway Department over the course of the last five years and equal to its total sales to all buyers—state and private—over the course of the last year. (J.A. 13, 40). Johnson Brothers had on hand, waiting for sale, an inventory of crushed limestone equal to its total sales over the last seven to eight months. (J.A. 38).

(iii) The Elkhorn Loan Application

Elkhorn's entry into the limestone business was financed by EDA's loan to Elkhorn of $1,137,500, upon extremely favorable terms and interest rates unavailable in the private market. Furthermore, EDA guaranteed a bank loan of $250,000 to Elkhorn. (J.A. 9).

Because of Petitioners' serious problem of idle and excess capacity, when they learned in early 1967 that Elkhorn had filed with EDA an application for financial assistance, they promptly communicated their concern to appropriate government officials.[3]

On May 22, 1967 Elkhorn's application was rejected (J.A. E-5), in major part because of the Section 702 problem.[4]

However, Elkhorn then filed supplemental data with EDA relating to the Section 702 problem. (J.A. E-30-65). This data, as described below, totally and errone-

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[3] On March 3, 1967, Levisa wrote EDA stating that Levisa was operating its equipment at less than its rated capacity and that the grant of Elkhorn's application for a loan and guarantee would result in a disruption and reduction of Levisa's existing and planned business operations and a reduction of Levisa's employment. (J.A. E-1).

On May 22, 1967, Johnson Brothers wrote EDA that it had undertaken a substantial expansion program which, with the Levisa capacity, could meet any future demand for crushed limestone in the area. Further, they stated that a representative from EDA had recently been in the area to evaluate the need for additional quarry operations, but that the representative did not talk with either Petitioner, the two major limestone producers in the area. (J.A. E-4).

[4] EDA indicated that a substantial consideration leading to the initial rejection of the Elkhorn application was that:

> "Application is in conflict with Section 702 of [the EDA Act]." (J.A. E-5).

ously misstated the facts as to Petitioners' productive capacity. Petitioners had no notice of this additional data and had no opportunity to respond to, rebut, or correct it.

On June 30, 1967, apparently on the basis of the misleading information, EDA reversed its position and by press release announced that Elkhorn's application had been granted. (J.A. E-8).

Elkhorn filed the following statements and characterizations relating to Petitioners' productive capacity. In connection with Johnson Brothers' expansion plans, the Pike County Chamber of Commerce, supporting the Elkhorn application, noted that "someone on behalf of Johnson Brothers, Elkhorn City, had represented that this firm planned to enlarge and expand its production. Such representation is not true." (J.A. E-63). Moreover, Elkhorn's economic expert characterized Johnson Brothers in the following terms:

> "This quarry has limited its production to about 75,000 tons per year and there is no plan to expand according to present information." (J.A. E-96).

Elkhorn also asserted that Levisa had been producing crushed limestone at the total rated capacity of its machinery. Elkhorn said that Levisa's current production was 1.5 million tons of rock per year, which was claimed to be its total capacity. (J.A. E-132). Based upon these representations, Elkhorn's economic expert asserted that "[i]n time of great demand, the nearest quarry [Levisa] may be unable to produce additional stone and the stone must come from a more distant county." (J.A. E-78). Moreover, Elkhorn asserted that "Levisa Stone Company cannot possibly furnish the requirements of the area to be served by the appli-

cant's project, during the next five years." (J.A. E-134).

These assertions as to Levisa and Johnson Brothers were, of course, clearly erroneous.

(iv) Proceedings Below

On August 23, 1967, Petitioners filed their companion suits challenging the grant of the financial assistance to Elkhorn. Thereafter, Elkhorn moved to consolidate the two complaints on the following grounds:

> ". . . the complaints in both actions raise common questions of law and fact, and . . . the opinion and judgment of the Court in Civil Action No. 1147 against Trowbridge, Secretary of Commerce, et al, will fix and determine the rights of the plaintiffs and defendant in this action, that is, *the rights of plaintiffs to maintain this action and for the relief demanded against this defendant . . . must stand or fall by the decision of the Court in plaintiffs' complaint against the Secretary of Commerce, et al.*" (J.A. 31; emphasis added.)[5]

Defendants in both cases filed motions to dismiss. These motions to dismiss, along with the Elkhorn motion to consolidate and Petitioners' motion for preliminary injunction, were set for oral argument on March 13, 1968. The oral argument focused basically upon the standing issue as defined in the *Hardin* case.

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[5] On October 5, 1967 Petitioners noted that they had no objection to the consolidation of the *Elkhorn* case with the case against the EDA defendants. (J.A. 34). The EDA defendants, as a formal matter, opposed consolidation, but conceded that the Government does "recognize . . . the basic interrelationship of these two actions. . . ." Defendants' Response to Motion of Elkhorn Stone Company, Inc. To Consolidate Civil Action No. 1148 with This Case, filed October 19, 1967 in *Levisa Stone Corp.* v. *Trowbridge*, Civil Action No. 1147 (E.D. Ky.).

At the conclusion of the oral argument, the District Court dismissed Petitioners' complaint against Elkhorn for failure to state a claim.[6] (Appendix B, pp. 4a-5a, *infra*). The court took under advisement the question whether Petitioners had standing to sue the Government defendants.

The District Court made no final order in the case against the Government defendants in the initial 30-day period. However, on May 6, 1968, the District Court, in an action totally inconsistent with its prior ruling, held that Petitioners had standing to sue the Government defendants, basing its decision on the holding of this Court in *Hardin* v. *Kentucky Utilities*. This Order is reprinted in Appendix D, 7a, *infra*. That case against the Government defendants is now being prepared for trial. The Government has not attempted to seek an interlocutory appeal from this District Court's decision.

The ironic results became apparent. The District Court had concluded that Petitioners could challenge, under Section 702, the Government's action in granting the financial assistance to Elkhorn. However, its prior ruling as to Elkhorn effectively vitiated the Court's order of May 6 because the challenged financial assistance had already been parceled out to Elkhorn; to secure effective relief after the trial involving the Government defendants, the final order would have to reach Elkhorn as well. Moreover, it appeared a clear possibility that the Government might seek to appeal from the interlocutory order under the provisions of Section 1292(b), 28 U.S.C. In these circumstances, Petitioners were faced with the possibility that only the Government would be before the appeals court.

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[6] Judgment dismissing the complaint against Elkhorn was entered on March 14, 1968. (J.A. 42).

Petitioners therefore decided to appeal the dismissal of the complaint in the *Elkhorn* case.

Under the Federal Rules, the District Court can extend the filing period of a notice of appeal for an additional thirty days beyond the initial thirty-day period. Therefore, on May 13, 1969, prior to the expiration of this second thirty-day period, Petitioners filed a written motion under the "excusable neglect" provisions of Rule 73(a)(2), F.R.C.P., to extend their time to file the notice of appeal. In support of their motion, Petitioners asserted:

> "The action of the Court in No. 1147 [the action against the Government Defendants] will require a trial upon the merits of the matter. The resolution of that case on the merits will necessarily involve the rights of the parties in No. 1148 [the Elkhorn action].
>
> "On appeal, plaintiffs will contend that the District Court erred in dismissing the complaint against the private parties in No. 1148. The implication and the import of this Court's decision dismissing the complaint in No. 1148 became clear only upon receipt of the decision of the District Court in No. 1147.
>
> "Moreover, it is possible that the Government will ask for leave to file an interlocutory appeal to the order of the District Court in No. 1147. Thus, if such leave is granted, a portion of the issue will be raised before the Court of Appeals. In these circumstances plaintiffs assert that it is proper that the full scope of the issues raised by plaintiffs' complaints be presented to the Court of Appeals.
>
> "For the foregoing reasons plaintiffs move that the extension heretofore requested be granted." (J.A. 42-43).

Respondent prepared and filed a written opposition to Petitioners' motion. On May 22, 1968, the District

Court, "having considered said motion and being sufficiently advised," granted Petitioners' motion for a thirty-day extension of time and ordered that the notice of appeal be filed. (J.A. 44). Respondent thereafter reasserted to the District Court, by written motion, that the Court had erred in granting the extension of time. (J.A. 46). The District Court denied the written motion to that effect. (J.A. 47).

Before the Court of Appeals, although the merits were briefed in full, Respondent again raised the issue of the extension of time. The opinion of the appellate court dealt only with the timeliness of the notice of appeal, an issue which it felt went to its "jurisdiction." The appellate court dismissed the appeal because the District Court had not made any findings of fact that Petitioners had met the standards of "excusable neglect" under Section 73(a)(2) to justify the extension of time—a point not asserted by Respondent either in its repeated appearances before the District Court or in its pleadings to the Court of Appeals. The Court of Appeals said that the District Court "without explanation granted [Petitioners'] motion and extended the time within which [Petitioners] could docket their appeal." (Page 3a, *infra.*)

Petitioners then petitioned for rehearing, praying that the only appropriate order was to remand the case to the District Court to permit the entry of findings of fact. Petitioners asserted that they should not be denied their rights to appeal because of the failure of the District Court to articulate its conclusions in a fashion satisfactory to the Court of Appeals. The petition for rehearing was denied. (Page 6a, *infra.*)

REASONS FOR GRANTING THE WRIT

This petition presents two important federal questions, both of which will be of recurring interest. The first deals with the right to sue the private beneficiary of illegal federal action in circumstances where standing to sue the responsible government official is present under the standards of *Hardin* v. *Kentucky Utilities*. The denial of standing here to sue such private parties conflicts with prior decisions of this Court and with numerous decisions of courts of appeals. The second question relates to the procedural standards governing the district court's grant of an extension of time to file a notice of appeal. In one of the initial decisions affecting the new Federal Rules of Appellate Procedure, the Court of Appeals has placed restrictive limitations on the exercise of the trial court's discretion in granting such extensions. This is contrary to the purpose of the liberalized Rule to broaden the scope of the district court's discretion in granting such extensions and contrary to the decisions of this Court and other circuits.

A. Under the Decision of Hardin v. Kentucky Utilities Co., Petitioners Have Standing To Sue Both the Offending Government Officials and the Private Beneficiary for a Violation of Section 702

Petitioners' right to challenge the violation of Section 702 is established beyond question by the decision of the Supreme Court in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968). That case confirmed the basic principle of standing that has been

> "... the rule at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require com-

pliance with the provision. See *Alton R. Co.* v. *United States*, 315 U.S. 15, 19 (1942); *Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83 (1958)." 390 U.S. at 5.

The purpose of the EDA Act is to authorize the Federal Government, in cooperation with the states, to help areas and regions of substantial and persistent unemployment and underemployment to take effective steps in planning and financing their public works and economic development.[7] Financial assistance under the Act must be expended for the purpose of developing new and additional employment opportunities. 42 U.S.C. § 3121.

However, Section 702 of the Act, captioned "Prevention of unfair competition," provides that no financial assistance shall be extended by EDA to any project where the result would be to increase the production of goods or commodities "when there is not sufficient demand for such goods, . . . [or] commodities to employ the efficient capacity of existing competitive commercial or industrial enterprises." 42 U.S.C. § 3212. The thesis of this prohibition is simple. If there is a present oversupply of goods and productive capacity, the addition of a new, federally-financed competitor will merely shift sales, and therefore employment, from existing

[7] In meeting these responsibilities in administering EDA, the Secretary of Commerce is authorized (i) to make loans to aid in financing projects within a redevelopment area, including the purchase and development of land and facilities (including machinery and equipment) for industrial or commercial usage, and (ii) to guarantee 90% of the unpaid balance of loans for working capital made to private borrowers by private lending institutions in connection with projects to which direct loans have been made. 42 U.S.C. § 3142.

businesses to the new competitor. The result will be no net addition of jobs in the area; and the purpose of the EDA Act—to create more jobs—will be frustrated, all at great expense and injury to existing businesses.

Applying the principles of *Kentucky Utilities,* there can be no doubt that Section 702 "does reflect a legislative purpose to protect a competitive interest"; Petitioners therefore have standing to challenge a violation of its provisions. Section 702 itself is, in terms, designed to prevent "unfair competition" against existing businesses which have unused productive capacity. The legislative history of the Section reaffirms this purpose.[8] The sponsor of Section 702 stated that its purpose was to:

> ". . . prevent the incredible situation which arises when the ARA [EDA's predecessor] lends money to establish a business which is going to create goods and services that already are in oversupply." (J.A. E-27a).

A supporter of Section 702 reaffirmed this purpose:

> "All this amendment does is to say to the ARA Administrator that we are not going to permit you to give loans to an industry that is going to manufacture a product that is now in oversupply. That is all we are doing . . . . It is a good amendment.

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[8] The EDA Act (S. 1648) was passed by the Senate on June 1, 1965, 89th Cong., 2d Sess. At this point, the bill contained no provision comparable to Section 702. Section 702 was added in the floor debate in the House. The Act passed the House, with amendments, including Section 702, on August 12, 1965. The text of the floor debate, 111 Cong. Rec. 20277 (1965), is set forth at J.A. E-27a. The House amendments were agreed to by the Senate on August 16, 1965.

It protects industry in your area and ought to be adopted by this Committee."[9] *Ibid.*

In administering the Act, EDA has itself recognized that Section 702 "is a simple prohibition protecting existing industry from unfair competition made possible through Federal assistance."[10] Finally, on at least four separate occasions, Congress has reaffirmed that Section 702 was designed to protect, as a class, the competitors of applicants for federal assistance under the EDA Act.[11]

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[9] A third supporter of Section 702 asserted:

"What it would do in effect is prohibit the ARA from coming in and loaning money to set up a new company to compete directly in the same market area with an established company in the same line of business. This is against their policy, they tell me . . . . But [for example] they come in . . . the gypsum industry . . . and do this. There were six gypsum plants out in the southwestern part of the United States. They were not getting enough business and they needed a new gypsum plant out there like they needed a hole in the head. Well, what did the ARA come in and do? They did not put one new gypsum plant there but they put two new gypsum plants there. Now they are working 3 days a week and most of them are in the red." (J.A. E-27a).

[10] (J.A. E-21). In making determinations under Section 702, EDA says that it takes full account of the effect of a loan application upon the competitors of the applicant. EDA officials have stated that the Administration will approve a loan only "when the additional production attributable to the EDA project will not adversely affect [the] operation" of the applicant's competitors. Hearings, Special Subcommittee on Economic Development Programs, House Committee on Public Works, 90th Cong., 1st Sess. (1967), at pp. 7-8.

[11] Hearings on "Status and Progress of Economic Development Program" before a Special House Subcommittee on Economic Development Programs, 89th Cong., 2d Sess. (1966); H. Rep. No. 82, 90th Cong., 1st Sess. (1967); Hearings on "Economic Development Administrator's Reply to Subcommittee's First Interim Report and Related Matters," Before a Special House Subcommittee

The District Court recognized that, under *Hardin* v. *Kentucky Utilities,* existing competitors, such as Petitioners, have standing to sue the responsible Government officials for violations of Section 702. However, the denial of the companion right to sue Elkhorn is inconsistent with an extended and consistent line of authority from the Supreme Court and from courts of appeals, all of which confirm the standing of an injured competitor under these circumstances to sue not only the Government officials whose actions create the illegal competition but also the private parties who engage in it.

Thus, in the *Kentucky Utilities* case itself, this Court held that plaintiffs had standing both against the Government defendants and also against the beneficiaries of the illegal Government action, the private distributors of TVA's power. See 390 U.S. at 1 and *Kentucky Utilities Company* v. *Tennessee Valley Authority,* 237 F. Supp. 502, 503 (E.D. Tenn. 1964).

Significantly, in support of the central proposition of the *Kentucky Utilities* decision, this Court cited earlier opinions in which plaintiffs had been held to have standing to challenge both the Government authorities which were said to be acting illegally and also the recipients of the Government's illegal acts. See *Alton R. Co.* v. *United States,* 315 U.S. 15 (1942), *aff'g,* 36 F. Supp. 898 (E.D. Mich. 1941); *Chicago* v. *Atchison, T. & S.F.R. Co.,* 357 U.S. 77 (1958); *The Chicago Junction Case,* 264 U.S. 258 (1924). See also *First National*

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on Economic Development Programs, 90th Cong., 1st Sess. (1967); Hearings on "Status of Projects and Sec. 702 Under Public Works and Economic Development Act of 1965," Before a Special House Subcommittee on Economic Development Programs, 90th Cong., 1st Sess. (1967).

Bank of Logan v. *Walker Bank and Trust Co.*, 385 U.S. 252 (1966). This principle has also been affirmed by the courts of appeal for the Fourth, Fifth, Sixth, Tenth and District of Columbia Circuits.[12]

This extended line of authorities makes it absolutely clear that, in challenges to unlawful Government action, the cause of action properly extends both to the Government officials and to the recipient of the governmental assistance which will create the unlawful competition. This result is, of course, consistent with the obvious purpose of a provision such as Section 702 which is, in terms, designed to prohibit the creation of "unfair competition." Furthermore, effective judicial relief would necessarily have to extend to the recipient of that illegal assistance, because upon final judgment the

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[12] In the Sixth Circuit, in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958), two suits were brought in the District Court challenging unlawful government action—one against the Government officials who acted illegally and the second against the private beneficiary of the Government action. That court held that plaintiff had standing against both the private and Government defendants. See also, *Community National Bank of Pontiac* v. *Saxon*, 310 F.2d 224 (6th Cir. 1962); *First Hardin National Bank* v. *Fort Knox National Bank*, 361 F.2d 276 (6th Cir.), *cert. denied*, 385 U.S. 959 (1966); *Peoples Bank of Trenton* v. *Saxon*, 373 F.2d 185 (6th Cir. 1967); *Bank of Dearborn* v. *Manufacturers Nat. Bank of Detroit*, 377 F.2d 496 (6th Cir. 1967). In the Fifth Circuit, certain insurance agents challenged the decision of the Comptroller of the Currency which improperly placed national banks in the insurance business. Plaintiffs were held to have standing in both suits they brought—one against the Comptroller and the other against the affected banks. *Saxon* v. *Georgia Assoc. of Ind. Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968). See also, *Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968); *First National Bank of Smithfield* v. *Saxon*, 352 F.2d 267 (4th Cir. 1965); and *Lincoln Bank & Trust Co.* v. *Exchange Nat. Bank & Trust Co., Ardmore, Okl.*, 383 F.2d 694 (10th Cir. 1967).

financial agreements between the EDA and the recipient would have to be altered.

This Court should grant certiorari to review this important issue as to the scope of a party's standing under the principles of *Hardin* v. *Kentucky Utilities.*

B. The Court of Appeals Distorted the Accepted Standards of Review of a District Court's Discretion in Allowing an Extension of Time To File a Notice of Appeal Pursuant to the Criteria of Rule 4 of the Federal Rules of Appellate Procedure

In reversing the discretionary decision of the District Court extending the time to file a notice of appeal, the Court of Appeals has interpreted the standards of Rule 4 of the new Federal Rules of Appellate Procedure in a restrictive spirit completely inconsistent with the intent that this Rule expand the discretion of the District Court and liberalize the criteria under which such extensions can be granted. This decision, one of the first to consider the amended standards incorporated in Rule 4, is therefore of great significance.[13]

Pursuant to the Federal Rules a notice of appeal must be filed within 30 days after judgment, *unless* the District Court extends that period for an additional 30 days. It is clear that a motion for an extension of time can be filed either before or after the expiration of the initial 30-day period. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-17

[13] The grant of the extension of time here to file the notice of appeal occurred when Rule 73(a), F.R.C.P., was in effect. Rule 73(a) was superseded on July 1, 1968, by Rule 4(a) of the Federal Rules of Appellate Procedure. However, the relevant portions of Rule 4(a) are identical to the provisions of former Rule 73(a). Thus, the decision of the Court of Appeals, coming as it does well after the adoption of Rule 4(a), naturally controls the interpretation of the identical provisions of the new Rule.

(1962).[14] The District Court may, in its discretion, grant the 30-day extension upon a showing of "excusable neglect." However, if the motion is made *after* the expiration of the initial 30-day period, it must be made by written motion; notice, "as the Court shall deem appropriate," shall be given to the opposing party.

The action of the Court of Appeals reversing the discretionary action of the District Court in granting the extension of time was clearly erroneous, as we detail below. Like *Foman* v. *Davis*, 371 U.S. 178, 181 (1962), this case presents a situation where it is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decision on the merits to be avoided on the basis of . . . mere technicalities."

(i) The Court of Appeals interpretation of the revised "excusable neglect" standards of Rule 4 was contrary to the liberalized standards of the amended Rule and in conflict with the decisions of this Court and other circuits.

The opinion below represents a severe contraction of the standards for extending time to file a notice of appeal which were liberalized by the 1966 amendments to the Federal Rules. Prior to the 1966 amendments, district courts were authorized to extend time for filing a notice of appeal only "upon a showing of excusable neglect *based upon a failure of a party to learn of the entry of the judgment.*" (Emphasis added). See 9 *Moore's Federal Practice*, ¶ 204.13[1] at

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[14] If the motion for extension is timely filed, it is settled that the court need not decide the motion within the sixty-day period. *C-Thru Products, Inc.* v. *Uniflex, Inc.*, 397 F.2d 952 (2d Cir. 1968).

967 *et seq.* (1969). However, the revised Rule broadened the power of the district court by eliminating the condition that the party must not have known of the entry of judgment. This amendment thus "empowers the district court to extend the time upon a showing of excusable neglect of any kind." [15]

The District Court in the present case presumably found this to be one of those "extraordinary cases where injustice would otherwise result" [15a] unless the extension was granted. There was ample reason for the District Court to do so, since the case in question was one inextricably intertwined with the decision in the companion suit against the Government defendants. As Petitioners asserted in support of their motion to extend time, "the action of the Court [in the case against the EDA defendants] will require a trial upon the merits of the matter . . . [which] will necessarily involve the rights of the parties" in the *Elkhorn* case. Indeed, Elkhorn itself had moved to consolidate the two interrelated cases because of their "common questions of law and fact." See *supra*, p. 9. The trial judge obviously felt that, in view of the close interrelationship of the two cases, it was excusable not to appeal the dismissal of one case until a later (and inconsistent) decision was reached in the other. Moreover, he well might have concluded, as Petitioners had asserted, that in any interlocutory appeal by the Government, "the full scope of the issues raised by [Petitioners'] complaints [should] be presented to the Court of Appeals." (J.A. 43).

These facts clearly presented a foundation for the District Court's discretionary action in granting the

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[15] Advisory Committee Note of 1966 to Amended Subdivision (a) of Rule 73, F.R.C.P., set forth at 9 *Moore's Federal Practice*, ¶ 203.25[3].

[15a] *Ibid.*

extension of time. As the Court of Appeals for the Fourth Circuit in *Evans* v. *Jones*, 366 F.2d 772, 773 (4th Cir. 1966), held:

> "... [T]he discretion of the district court [has been] expanded by the recent amendment of Rule 73(a), to permit a finding of excusable neglect *on any ground*, not, as heretofore, only if non-compliance stemmed from failure to learn of the entry of judgment. H.R. Doc. 391, 89th Cong., 2d Sess. (Feb. 28, 1966)." [16]

In these circumstances, under all applicable precedents, "great deference" should have been afforded the trial judge's decision to extend time. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962). See *Foman* v. *Davis*, *supra*; *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384 (1964). The appellate court's sole function is to determine whether the trial court "committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant facts." *Lowry* v. *Long Island R.R.*, 370 F.2d 911, 912 (2d Cir. 1966); *cf. Buckley* v. *United States*, 382 F.2d 611, 614 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968); *Nichols-Morris Corporation* v. *Morris*, 279 F.2d 81, 83 (2d Cir. 1960). However the appellate court here did not even acknowledge the full measure of discretion lodged in the district court, but merely concluded that,

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[16] Likewise, in interpreting a similar criminal rule, amended at the same time and to the same effect as Civil Rule 73(a)(2), see 9 *Moore's Federal Practice* ¶ 204.13 [1] at 971-73 (1969), the Court of Appeals for the District of Columbia Circuit has observed that "the decision as to whether there was excusable neglect must be approached and made in the spirit of liberality that led to the 1966 amendment." *Johnson* v. *United States*, 405 F.2d 1072, 1074 (D.C. Cir. 1968).

in its own judgment, the "circumstances do not suggest 'excusable neglect.'". Moreover, since the District Court's order did not make express findings—although such findings are necessarily implicit in its decision to extend time—the Court of Appeals held that the order extending time "was of no effect" and that the appellate court had "no jurisdiction to hear the appeal."

The Court of Appeals appears to have been misled by an improper reading of this Court's decision in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc., supra,* into applying these erroneous standards of appellate review. Thus, the Court of Appeals said:

> "*Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, . . . is cited by Appellants in support of their contention that a District Court's order extending the filing period should be given great deference by reviewing courts. In *Harris,* however, the party moved to extend the filing period prior to the expiration of the initial thirty-day period. . . . *Harris,* of course, is distinguishable from the case before us because Appellants did not move to preserve their right within the initial thirty-day period." (*Infra,* pp. 3a-4a.)

The court below apparently concluded that, since the motion to extend was filed *after* the running of the initial thirty-day period, no "great deference" should be given the decision of the trial court by the appellate court. Clearly, there is nothing in the *Harris* case, or in the Federal Rules, which would lead to the conclusion that the trial court's discretion to grant the extension is more limited when the motion is filed after the initial thirty-day period. To allow this mischievous gloss to remain on the Appellate Rules and the *Harris* decision will seriously circumscribe the discretion of the district courts and the opportunity to have matters resolved on their merits.

(ii) If there was any doubt as to the District Court's reasons for granting the motion to extend, the Court of Appeals should have remanded.

In substituting its own judgment for that of the trial court, the Court of Appeals declined to adopt the only proper course available in light of its doubts as to the wisdom of the trial judge's discretionary decision. It should have remanded for a statement of the lower court's reasons. Petitioners moved that the court adopt that course in their Petition for Rehearing filed in the Court of Appeals on July 24, 1969, but the suggestion was rejected.[17]

Petitioners should not be deprived of their rights to have the merits of this controversy adjudicated because of the failure of the District Court adequately to explain its reasons for granting Petitioners' motion. Remand is the obvious and accepted course where the factual basis of the District Court's action is not sufficiently clear to the reviewing court. *Evans* v. *Jones, supra,* 366 F.2d at 773; *Johnson* v. *United States, supra,* 405 F.2d at 1074-75.

CONCLUSION

For the foregoing reasons Petitioners pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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December 5, 1969 — *Counsel for Petitioners*

[17] Order of August 29, 1969, p. 6a, *infra*.

APPENDIX

APPENDIX A

No. 18931

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEVISA STONE CORPORATION AND JOHNSON BROTHERS LIMESTONE COMPANY, *Plaintiffs-Appellants,*

v.

ELKHORN STONE COMPANY, INC., *Defendant-Appellee.*

On Appeal from the United States District Court
for the Eastern District of Kentucky

Decided June 19, 1969

Before: O'SULLIVAN, PHILLIPS AND CELEBREZZE, Circuit Judges.

CELEBREZZE, Circuit Judge. This controversy arose as a result of the Secretary of Commerce granting loans and other financial assistance to Appellee pursuant to the Public Works and Economic Development Act of 1965, 42 U.S.C. §3121 et seq., to enable Appellee to enter the crushed limestone market in southeastern Kentucky.

Appellants, who are presently crushing limestone in this area, sued Appellee and the Secretary of Commerce separately in the United States District Court for the Eastern District of Kentucky contending that the Secretary's financial assistance to Appellee violated a provision of the Act that enjoins the Secretary from extending such assistance when it would lead to unfair competition. Sec. 702 Public Works and Economic Development Act of 1965. 42 U.S.C. § 3212. On September 29, 1967 Appellee and the Government, in behalf of the Secretary of Commerce, moved to dismiss the actions. On March 14, 1968 the District Court dismissed the complaint against Appellee but took under advisement the Government's motion to dismiss the complaint against the Secretary of Commerce.

The District Court denied the Government's motion on May 13, 1968, well over the time allowed Appellants to file notice of appeal of the judgment dismissing their action against Appellee. Rule 73(a), Federal Rules of Civil Procedure allows thirty days in which to file notice of appeal.[1] On that date, however, Appellants moved for leave pursuant to Rule 73(a)(2) to extend the time for filing such notice to and including May 13, 1968. In support of their motion Appellants argued that the consequences arising from the dismissal of their action against Appellee only "became clear" on May 13, 1968, the date that the District Court rejected the Government's motion to dismiss the action against the Secretary. Appellee vigorously opposed the extension of time but the District Court, after a hearing, granted Appellants' motion and ordered that the time for filing notice of appeal be extended to and including May 13, 1968. Appellants promptly filed their notice of appeal. This was more than thirty days but less than sixty days after the judgment of the District Court dismissing Appellants' action against Appellee. The District Court, however, made no findings of fact in support of its order.

On September 9, 1968 Appellee filed in this Court a motion to dismiss the appeal. We took the motion under advisement and passed it to the hearing on the merits. On April 9, 1969 we heard oral argument on the motion and on the merits. We have concluded that we have no jurisdiction to hear the appeal and that it must be dismissed. We therefore express no opinion on the merits of this controversy.

Notice of appeal from any judgment where the United States was not a party must be filed within thirty days after the entry of such judgment. Rule 73(a) Federal

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[1] The events in this case occurred before July 1, 1968. On this date Rule 73(a) of the Federal Rules of Civil Procedure was superseded by Rule 4 of the Federal Rules of Appellate Procedure.

Rules of Civil Procedure; 28 U.S.C. § 2107. If a party does not file within the thirty day period, we lack jurisdiction to hear his appeal. *Schlink* v. *Chesapeake & Ohio Railroad Co.*, 276 F.2d 116 (6th Cir. 1960).

Although this Court cannot waive or extend the filing period, a District Court may extend it "not to exceed thirty days . . . from the expiration of the original time." Rule 73(a)(2); *In Re Reed*, 398 F.2d 800 (6th Cir. 1968). The District Court, however, is not untrammeled in its power to extend the filing period; the movant must allege and show "excusable neglect" for failure to timely file his appeal and the District Court must make such a finding before it may extend the filing period beyond the first thirty days. This is the sole ground upon which the District Court may extend the filing period. *Richland Knox Mutual Insurance Co.* v. *Kallen*, 376 F.2d 360 (6th Cir. 1967).

Under an earlier version of Rule 73(a)(2), "excusable neglect" could only arise where a "party [failed] to learn of the entry of judgment . . ." Although this express limitation was deleted from the Rule in 1966, it still remains the principal ground for a showing of excusable neglect. *Winchell* v. *Lortscher*, 377 F.2d 247 (8th Cir. 1967.)

In the case before us Appellants do not claim that they were unaware of the judgment dismissing their complaint against Appellee. That aside, Appellants did not allege or show that their neglect was excusable, nor did the District Court find that it was; the Court without explanation granted Appellants' motion and extended the time within which Appellants could docket their appeal.

Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) is cited by Appellants in support of their contention that a District Court's order extending the filing period should be given great deference by reviewing courts. In *Harris*, however, the party moved to extend the filing period prior to the expiration of the initial thirty-day period. The Court held that the "obvious great

hardship" to the party relying on the Judge's finding overcame what the result "should have been on the initial facts." *Harris*, of course, is distinguishable from the case before us because Appellants did not move to preserve their right within the initial thirty-day period. We do not have here an extraordinary situation where dismissal of Appellants' appeal would yield a grave injustice. Appellants knew exactly when the judgment against them was entered and they could have easily perfected this appeal within the prescribed period. As Appellee correctly points out, Appellants knew nothing more after the District Court rejected the Government's motion to dismiss the action against the Secretary of Commerce than they did before. These circumstances do not suggest "excusable neglect." And since the District Court did not find that they did, its order extending the time for filing notice of appeal was of no effect and we have no jurisdiction to hear the appeal.

Appeal dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Filed 3/14/68

Civil No. 1148

LEVISA STONE CORP., ET AL., *Plaintiffs*

v.

ELKHORN STONE COMPANY, ET AL., *Defendants*

Order

On March 13, 1968, at Lexington, came the plaintiffs by their attorneys, O. T. Hinton and James F. Fitzpatrick; the defendant Elkhorn Stone Company by its attorney, Francis M. Burke; and the defendant The First National

Bank of Pikeville by its attorney Don Combs, for hearing on the motions of the defendants to dismiss the complaint.

Without objection being offered by counsel for the other parties, it was ORDERED that the motion of the defendant The First National Bank of Pikeville to dismiss the complaint as to it be and it is hereby sustained and that defendant is dismissed as a party to this action.

The Court heard counsel in support of and in opposition to the motion of the defendant Elkhorn Stone Company to dismiss the complaint. The Court being advised ORDERED that the motion be and it is sustained for failure of the complaint to state a claim against the defendant upon which relief can be granted, and this action is hereby dismissed.

BERNARD T. MOYNAHAN, JR.
Bernard T. Moynahan, Jr.,
Judge

A True Copy Attest

DAVIS T. MCGARVEY, *Clerk*
U. S. District Court

March 14, 1968

APPENDIX C

No. 18,931

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed Aug. 29, 1969

CARL W. REUSS, *Clerk*

LEVISA STONE CORPORATION and JOHNSON BROTHERS LIMESTONE COMPANY, *Plaintiffs-Appellants*,

v.

ELKHORN STONE COMPANY, *Defendant-Appellee*.

Order

Before: O'SULLIVAN, PHILLIPS and CELEBREZZE, Circuit Judges.

Upon due consideration, Appellants' petition for rehearing is hereby denied.

Entered by Order of the Court

CARL W. REUSS, Clerk

APPENDIX D

Order of District Court in Companion Case, Levisa Stone Corp. v. Trowbridge, Holding That Petitioners Have Standing To Sue

Order

No. 1147

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

LEVISA STONE CORP., ET AL., *Plaintiffs*

v.

ALEXANDER B. TROWBRIDGE, ETC., ET AL., *Defendants*

* * * * * * * * * * *

The Court having considered the motion of the defendants to dismiss the complaint herein and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN that said Motion to Dismiss be and the same is hereby overruled. *Hardin, et al.* v. *Kentucky Utilities Company*, 390 U.S. 1.

This the 3rd day of May, 1968.

BERNARD T. MOYNAHAN, JR., *Judge.*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

No. 924

LEVISA STONE CORPORATION, and JOHNSON BROTHERS LIMESTONE COMPANY, - - - - - - - Petitioners,

versus

ELKHORN STONE COMPANY, INC., - Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI, TO UNITED STATES COURT OF APPEALS, FOR SIXTH CIRCUIT.

BURKE & JUSTICE,
Attorneys at Law,
Pikeville, Kentucky,

FRANCIS M. BURKE,
Attorney at Law,
Pikeville, Kentucky,
Attorneys for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

No._____

LEVISA STONE CORPORATION, and JOHNSON BROTHERS LIMESTONE COMPANY, - - - - - - - *Petitioners,*

v.

ELKHORN STONE COMPANY, INC., - *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI, TO UNITED STATES COURT OF APPEALS, FOR SIXTH CIRCUIT.

The respondent, Elkhorn Stone Company, Inc., prays that the writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Judicial Circuit filed by petitioners be denied.

COUNTERSTATEMENT OF QUESTION PRESENTED.

Did the United States Court of Appeals for the Sixth Circuit err in holding that since the district court did not find excusable neglect within the meaning of FRCP 73 (a) (2), its order extending the time for filing notice of appeal was ineffective to give jurisdiction to the appellate court.

STATUTES AND RULES INVOLVED.

The petitioners, in their petition for writ of certiorari, in compliance with Rule 40 of the Supreme Court, have set forth on pages 2 and 3 of their petition the statutes and rules involved in this case. Petitioners assert the applicability of FRAP 4 which became effective July 1, 1968. The respondent denies that Rule 4 of the Federal Rules of Appellate Procedure is applicable in this case. The United States Court of Appeals for the Sixth Circuit, in sustaining a motion to dismiss the appeal because of lack of its jurisdiction, was compelled to and did construe FRCP 73 (a) (2). That rule regulating the filing of late notices of appeal was the governing rule in May of 1968, the Federal Rules of Appellate Procedure not becoming effective until July 1, 1968. Indeed, it should be pointed out that the petitioners styled their motion for leave to file their notice of appeal in the District Court as: "Motion for Leave to File Notice of Appeal Pursuant to Rule 73 (a) (2)" (JA, Vol. 1, pp. 42-43).

STATEMENT OF THE CASE.

The United States Court of Appeals for the Sixth Circuit dismissed the petitioners' appeal from a judgment of the United States District Court for the Eastern District of Kentucky on the sole ground that it did not have jurisdiction of the appeal because of the petitioners failure to file a timely notice of appeal. The specific basis of the holding was that the petitioners had not shown "excusable neglect" within the mean-

ing of FRCP 73 (a) (2) as that rule existed at the time of the entry of the judgment in the United States District Court. The United States Court of Appeals for the Sixth Circuit expressly did not reach the merits of this controversy, its opinion concluding that the appeal must be dismissed because it had no jurisdiction to hear the appeal (Opinion, Appendix A, Petitioners' Petition for Writ of Certiorari).

In this state of the record, the respondent respectfully submits that the merits of the initial controversy are not before this Court for review and that the single question presented is whether the United States Court of Appeals for the Sixth Circuit committed error in its construction of FRCP 73 (a) (2) as that rule existed at the time of the entry of the judgment in the trial court, and at the time the belated notice of appeal was attempted to be filed. The respondent rejects the petitioners' statement of facts on the merits as being irrelevant to the procedural question on which the petition turns.

The relevant facts here are that on March 14, 1968, the United States District Court for the Eastern District of Kentucky entered a final order dismissing petitioners' complaint (JA, Vol. 1, p. 42).

On May 13, 1968, the sixtieth day after the entry of the final judgment, the petitioners filed their "Motion for Leave to File Notice of Appeal Pursuant to Rule 73 (a) (2)." This motion was not filed pursuant to the provisions of Rule 4 of the Federal Rules of Appellate Procedure, those rules not becoming effec-

tive until July 1, 1968, more than one month after the filing of such motion on May 13, 1968.

A Notice of Appeal was tendered simultaneously with the filing of this motion (JA, Vol. 1, pp. 42-43).

The motion of the petitioners for extension of time, filed on the sixtieth post-judgment day, reads:

> "Plaintiffs herein move that the Court extend for 30 days the period in which to file a notice of appeal pursuant to the provisions of Rule 73 (a) (2), to and including May 13, 1968.
>
> "As grounds for said motion, plaintiffs assert that on May 6, 1968 in a companion case to the instant case, entitled Levisa Stone Corporation, et al. vs. Alexander B. Trowbridge, et al., being No. 1147 on the docket of this Court, this Court denied the Government's motion to dismiss the complaint therein.
>
> "The action of the Court in No. 1147 will require a trial upon the merits of the matter. The resolution of that case on the merits will necessarily involve the rights of the parties in No. 1148.
>
> "On appeal, plaintiffs will contend that the District Court erred in dismissing the complaint against the private parties in No. 1148. *The implication and the import of this Court's decision dismissing the complaint in No. 1148 became clear only upon receipt of the decision of the District Court in No. 1147.*
>
> "Moreover, it is possible that the Government will ask for leave to file an interlocutory appeal to the order of the District Court in No. 1147. Thus, if such leave is granted, a portion of the issue will be raised before the Court of Appeals.

In these circumstances plaintiffs assert that it is proper that the full scope of the issues raised by plaintiffs' complaints be presented to the Court of Appeals.

"For the foregoing reasons plaintiffs move that the e x t e n s i o n heretofore requested be granted." (Our emphasis.)

This action was pending on the docket of the United States District Court for the Eastern District of Kentucky, Pikeville Division. Pikeville, Kentucky is located approximately 135 miles southeast of Lexington, Kentucky, the central location of that District Court. On May 20, the respondent filed its objection to the motion of the petitioners for leave to file a notice of appeal out of time, but before the file could be forwarded to the District Court Judge for consideration, and without any hearing being accorded to the respondent, the trial court signed an order sustaining the motion for leave to file the notice of appeal and directed that the tendered notice be filed as of May 13, 1968. This order did not make any finding of neglect, excusable or otherwise (JA, Vol. 1, p. 44).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

The first question stated as being presented by this petition is whether an injured competitor has standing to challenge alleged illegal act of the government giving financial assistance to a private party.

It is respectfully submitted that this question is not before the Court on this petition. The Supreme Court of the United States does not sit as a court of original jurisdiction. In controversies such as this, this Court merely reviews decisions at the trial and intermediate appellate level. By no stretch of the imagination can this petition for a writ of certiorari serve to permit this Court to try a dispute on its merits.

Nor does this case involve any question of erroneous interpretation of new Rule 4 of the Federal Rules of Appellate Procedure simply because the right to file the notice of appeal out of time in the District Court was governed by the provisions of FRCP 73 (a) (2) governing appellate review at the time the motion was filed.

Prior to 1966, FRCP 73 (a) provided in its pertinent part:

> "The time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from * * * except upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the District Court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

By amendment effective July 1, 1966, FRCP 73 (a) was amended in its relevant part to read as follows:

> "An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed

> from, except that: (1) in any action in which the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days from such entry; (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed;"

It is the unanimous rule that compliance with the rules regulating appeals is mandatory and jurisdictional and that a failure to comply with such rule divests the Court of Appeals of its jurisdiction with the resulting loss to the right of appeal. *Deena Products Co.* v. *United Brick & Clay Workers of America, et al.,* 195 F. 2d 612 (6th CA); *Schlink* v. *Chesapeake & Ohio Railroad Company,* 276 F. 2d 116 (6th CA); *Richland Knox Mutual Insurance Co.* v. *Kallen,* 376 F. 2d 360 (6th CA).

Even under FRCP 73 (a), as it existed prior to July 1, 1966, an ex parte order extending the time for filing a notice of appeal, without notice to the opposing party, was void. *Cohen* v. *Plateau Natural Gas Co., et al.,* 303 F. 2d 273 (10th CA); *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.,* 193 F. 2d 951 (9th CA).

In *Winchell* v. *Lortscher,* 377 F. 2d 247, at page 251, the Eighth Circuit Court of Appeals said:

> "A motion for extension of time to appeal may be made in the District Court either before or after the expiration of the original 30 days. Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,

1962, 371 U. S. 215, 216-217, 83 S. Ct. 283, 9 L. Ed. 2d 261. But after the expiration of the original 30 days the District Court may not grant ex parte an extension of time for appeal but must give notice and opportunity to be heard to all adverse parties. Cohen v. Plateau Natural Gas Co., 10 Cir., 1962, 303 F. 2d 273, 274, certiorari denied, 371 U. S. 825, 83 S. Ct. 45, 9 L. Ed. 2d 64; North Umberland Mining Co. v. Standard Acc. Ins. Co., 9 Cir., 1952, 193 F. 2d 951, 952. In the above cited cases the Courts of appeals found themselves unable to take jurisdiction either because the notice of appeal was filed beyond the absolute 60-day limitation or the extension of time within which to take an appeal was improperly granted by the trial court after the expiration of the original 30-day period in an ex parte proceeding. Neither of these situations is present in the instant case for the motion for an extension of time and the notice of appeal were filed on the sixtieth day after the entry of an appealable order and the motion for an extension of time was granted after an adversary hearing, although there may be some question here as to whether appellee personally received notice of this twelfth hour proceeding. Therefore this case, unlike those previously cited, squarely presents the problem of whether there was, as a matter of law, any grounds for granting an extension of time for an appeal beyond the original 30 days after the entry of the appealable order, as provided for in Rule 73 (a)."

The order of the district court extending the time, entered on May 22, 1968, was entered at Lexington, Kentucky without the record in this case being before

him, and without the trial court being advised of the respondent's objections. Moreover, it was entered without the opportunity being given respondent to be heard on its objections.

It will be noted that the order permitting the filing of the notice of appeal as of May 13, 1968, did not recite any finding of neglect, excusable or otherwise, or any reason at all why the extension of time was granted.

Prior to July 1, 1966, the only excusable neglect authorizing the district court to extend the time for the filing of a notice of appeal was a failure of a party to learn of the entry of judgment. At the time here pertinent, FRCP 73 (a) (2) authorized an extension of time upon a showing of "excusable neglect."

That power, however, could only be exercised upon the meeting of the standards set forth. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 303 F. 2d 609, vacated 83 S. Ct. 283, 371 U. S. 215, 9 L. Ed. 261, on remand 313 F. 2d 864; *Winchell* v. *Lortscher, supra.*

Good cause for an extension of time must be shown. *U. S.* v. *Bowen,* 306 F. 2d 620 (5th CA).

The only pronouncement by a United States Court of Appeals construing FRCP 73 (a) (2) is that of *Winchell* v. ***Lortscher, supra.***

There the Eighth Circuit quoted from the Advisory Committee's comments upon the effect of the change in the rule.

> " 'The original rule authorized the district court to extend the time for appeal for a period not to exceed 30 days from the expiration of the

time otherwise prescribed "upon a showing of excusable neglect based upon a failure of a party to learn of the entry of the judgment * * *." The exception numbered (2) eliminates the phrase "based upon a failure of a party to learn of the entry of the judgment" and thus empowers the district court to extend the time upon a showing of excusable neglect of any kind. In view of the ease with which an appeal may be perfected, no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result.'"

The Court then said:

"The word change was therefore not intended to fundamentally alter the scope of the rule. Judicially, it has long been recognized that in light of Rule 73 (a) the only valid ground for extension of appeal time is a showing of excusable neglect based upon the failure of a party to learn of an entry of judgment. Se, e. g., Knowles v. United States, 5 Cir., 1958, 260 F. 2d 852, 854; Howard v. Local 74, Wood, Wire and Metal Lathers International, 7 Cir., 1953, 208 F. 2d 930, 932; Felton v. Florida East Coast Ry. Co., D. C. S. D. N. Y. 1948, 8 F. R. D. 232, 233. In light of the Advisory Committee's comments upon the Rule 73 (a) changes and the interpretative judicial decisions, it is clear that it remains incumbent upon appellant to show that he comes precisely within the scope of Rule 73 (a) which still requires a showing of excusable

> neglect based upon the failure of a *party* to timely learn of an entry of judgment before any extension of time to make an appeal beyond the original 30-day period is permitted."

The motion for leave here under consideration does not purport to state any neglect, excusable or otherwise. It is asserted that in a "companion case" a certain order was entered on May 6, 1968. On March 14, 1968, the trial court sustained a motion to dismiss and entered a final judgment dismissing the complaint. The petitioners and their counsel knew the implication and import of that order on the day it was entered as fully as they did on the sixtieth post-judgment day. The entry of an order overruling a motion to dismiss in another case added nothing to their knowledge with respect to the implication and import of the final order dismissing the complaint in this case.

If plaintiffs-appellants' counsel committed error in his construction and effect to be given the judgment dismissing the complaint in the case at bar, it was not excusable neglect. To hold otherwise would be to say that after counsel makes a reasoned judgment in the conduct of a trial, he can thereafter urge that he was in error and that his neglect excuses his client from the consequences of that error.

We respectfully submit that a mistaken opinion of counsel, made with full knowledge of all the facts, cannot be transmuted into "excusable neglect" as that term is used in FRCP 73 (a) (2).

RELIEF REQUESTED.

The respondent respectfully requests that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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